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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION THREE

In re D.M., a Person Coming Under the  
Juvenile Court Law.

CONTRA COSTA COUNTY CHILDREN  
AND FAMILY SERVICES BUREAU,

Plaintiff and Respondent,

v.

J.M.,

Defendant and Appellant.

A130859

(Contra Costa County  
Super. Ct. No. JUVMSJ-1000120)

Father appeals from juvenile court orders assuming jurisdiction over his seven-year-old daughter and removing her from his custody based on a finding that the daughter was at risk of physical harm because father had sexually abused her 13-year-old half-sister (hereafter sister). He contends the sister's hearsay statements regarding the abuse are insufficient to support the court's factual findings. Father also contends the trial court violated his right to due process by prohibiting him from presenting evidence of allegations of sexual abuse that the sister may have made against other individuals. We shall affirm.

**Factual and Procedural History**

On January 20, 2010, Contra Costa Children and Family Services Bureau (Bureau) removed the daughter from her parents' custody based a report that father had sexually abused sister, and mother had failed to take measures to protect the children. On March 24, an amended petition was filed alleging that the daughter came within Welfare and

Institutions Code section 300, subdivision (j).<sup>1</sup> The petition alleges that “[o]n or about January 17, 2010, the child’s father . . . a member of the family household, sexually abused the child’s sibling” and that the child is at substantial risk of harm based on her sister’s abuse and because “the mother does not believe the child’s sibling was sexually abused by [father].”

At the contested jurisdictional hearing, based on testimony by the sister’s therapist, the trial court found that the sister was psychologically unavailable to testify. The following evidence was presented at the hearing:

A videotaped forensic interview with the minor was played in which sister detailed father’s sexual abuse. She said that he told her to “do sex with him” and put his penis in her mouth. She claimed that it hurt her when he put his penis in her and she bled on the bed when it happened. She claimed that after the abuse, he took her to the bathroom and told her to clean herself good so they could “do sex” again. It was unclear from sister’s story whether she was reporting one or multiple events. She indicated that the abuse occurred in the bathroom while her mother was at work, but also said she was abused in her bedroom. When asked whether the events occurred on the same day, sister said that “it happened on Saturday Sunday . . . it was 5:30 to 2:30 . . . when my mom was gone.” She also said that her father “always” came into her room and at one point she said he abused her “10 times each day.” Towards the end of the interview, when asked whether there was anything else sister thought the interviewer should know, sister said, “I have two friends at school . . . He was trying to do the same thing. He put his peanut on me again . . .” The interviewer stopped sister, explaining that they could talk about her classmate “another day.”

Jim Knight testified that he had been sister’s teacher for about two years. He explained she was a student in his special education classroom because she has a significant visual impairment and a reading disability. On standardized tests, she

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<sup>1</sup> All statutory references are to the Welfare and Institutions Code unless otherwise noted.

performs at least three grades below grade level. According to sister's attorney, sister has been diagnosed with mental retardation among other things.

On January 20, 2010, Mr. Knight noticed sister was visibly shaken and not her normal self, so he asked her what was going on. She told him that her father had been with her in a sexual way, describing masturbation and administering oral sex. Mr. Knight read from a statement he prepared on January 21, 2010, regarding his conversation with sister. The statement read, in part, as follows:

“[She] said her dad touched her in her private parts. She said that this has been going on since her mom started working at Mi Pueblo. She works there on Saturday and Sunday and also throughout the week. [¶] [She] said her dad put his penis inside her, and she said he does it hard. She said it hurts her. . . . She also said that her dad put his hand under her pants on her private part. She told him to take his hand away, and he did not do it. She said he wants to do sex with her. She also said that he kissed her on the mouth. She said that he told her to go to the bathroom and asked her to touch his penis. [¶] She said her dad told her to touch his penis. He had put some liquid on her private part, and then he put his penis inside her. She said he also put his penis in her bottom. She said he also put his finger in her private part. [¶] [She] said that her dad also asked her to hold his penis with her hand and move it back and forth fast. He also put her head down and asked her to kiss his penis. [She] said her dad also asked her to lay down on the bed. She said he took her clothes off, and then he laid down on her. She said he put his penis where her behind is and also in her private part. [¶] [She] said she told her mom all of this . . . . She said her mom was crying, and that her dad was mad and told her mom to take her to emergency to the doctor. [Her] mom took her to the doctor at emergency. [She] said the doctor said it was true what had happened because it was red in there. [Her] mom asked [her] if she wanted her dad to go to jail and she said ‘yes.’ [¶] [She] said that her dad told her not to tell her mom about it because he would get in trouble if . . . she tells someone. [She] said she told her mom she wants him to go to jail so she won’t hurt anymore.” Mr. Knight testified that sister had never reported any sexually inappropriate incidents before the date she described the sexual abuse by her stepfather.

Steven Anello, sister's school bus driver, testified that one day he heard the sister crying on the bus. When he asked her what was the matter, she told him that "her father was having sex with her." When asked to explain, she responded, "He put his penis on me." The sister had never said anything to Mr. Anello of a sexual nature before or after this disclosure.

Monica Franco, sister's homework tutor, testified regarding an incident in January 2010, when sister told her that she had been sexually abused by her stepfather.

Ms. Franco recalled that sister, who "never cries," was in tears. Sister told her that her stepfather touched her, and gestured by placing her hands on her chest and in her vaginal area. She described that her stepfather put his "weenie" in her. Another school employee, Kisha Lee, testified that she called to social services to report the abuse. In Ms. Lee's presence, the social worker interviewed sister over the speaker phone. Ms. Lee heard sister tell the social worker that she had been touched by her stepfather while her mother was at work, that "he put his penis in my area," and that "he drinks a lot and it happens when he drinks."

Ruth Armstrong, a nurse practitioner at San Francisco General Hospital's Rape Treatment Center, testified that she examined sister on January 18, 2010. Sister told her that she had been kissed on the mouth and touched on her vagina by a classmate on the school bus. She said this touching occurred on three separate occasions, most recently on January 11, 2010. Sister did not mention any sexual contact with father. Ms. Armstrong interviewed sister in mother's presence. The medical examination did not yield definite or significant physical findings of sexual assault. Ms. Armstrong explained that even if sister had been sexually assaulted on the day of the exam, there might not be physical findings of the assault. Ms. Armstrong advised mother to report the assault to the police in Contra Costa County.

Pittsburg Police Officer James Terry testified about his investigation of the sexual abuse allegations. He spoke to Kisha Lee, who said she had "problems in the past with [sister]'s honesty and dishonesty," but also specifically noted that sister had never said anything to her of a sexual nature before her disclosure about the abuse. Officer Terry

recalled that sister was difficult to interview because she had a hard time focusing on his questions. She offered many details of the molestation but could not provide consistent times or dates for the events. He explained, “At one point, she said it had been going on for six months, another point she said it was going on a couple of weeks. But, the most consistent [answer] was it occurred Saturday or Sunday prior [to the interview which took place on January 20.]” She said father asked her if she wanted to “do sex”; that he touched her breasts; that he told her to touch his penis; that he put her hands onto his penis; that his penis was hard; that he inserted his penis into her vagina and it hurt; that when he pulled his penis out of her vagina, a gray liquid came out; and that he cleaned up the “liquid” on her vagina with a paper towel. She described her father’s penis as approximately 20 inches long and said “the whole thing was hairy.”

Rhonda Hayes, an emergency response social worker, first met with sister at the receiving center on January 21, 2010. Ms. Hayes recalled that when she first met sister she spontaneously began describing sexual abuse by father: “She said that her dad continues to touch her. Keeps touching her. That he can't stop. That he comes in the bathroom and pulls her pants down. That he asks her to have sex with her. And she said that she informed her mother that her husband was doing bad things. And that she indicated that she would — she told Dad if he didn't stop that she would call the cops and have him arrested.”

Sandra Andrade, the social worker assigned to sister’s case, testified that during a meeting with sister on April 14, 2010, sister spontaneously volunteered numerous details of the sexual abuse by her stepfather, including that “[he] put his penis in her vagina; he asked her if she wanted to have sex with him; she said ‘no’; he would sometimes come in the morning while her sister . . . was asleep to touch her; she said, if [father] drinks and gets drunk[,] this sometimes causes him to do things to her . . . like kiss[] her on the mouth or to get her to touch his penis, and she says ‘no’; she stated that he has taken . . . her hand by force and put it on his penis to move it up and down.” Sister also told her that father took her to the bathroom and locked her in; that he offered her alcohol and pushed

his fingers inside her vagina. “He would tell her to take a good shower, and then he would open the shower door and will look at her naked, which she did not like.”

The parties stipulated that Dr. Abraham Rice would testify that he examined sister on January 28, 2010, that she gave a spontaneous statement of being assaulted by her stepfather, and that the statement was “rich in detail and very believable.”

After hearing arguments on the merits of the case, the court concluded that it had “absolutely no doubt” that the sexual abuse allegations were true. The court found sister’s statements credible because they were repetitive, spontaneous and consistent; because she used language “that would be unusual for a child of this age and this exposure”; and because she lacked a motive to fabricate. The court also sustained the allegations that mother did not believe sister was sexually abused by father and that both children were at substantial risk of sexual abuse.

### **Discussion**

#### **1. Substantial evidence supports the jurisdictional findings.**

Although acknowledging that the testimony was admissible (*In re Cindy L.* (1997) 17 Cal.4th 15), father contends that sister’s hearsay reports of sexual abuse were insufficient to support the jurisdictional findings because (1) the evidence presented to the court did not establish that sister was capable of distinguishing between the truth and a lie; (2) even if minor was competent, she was not able to clarify important details such as when and how many times the alleged abuse occurred and her allegations were “unfocused and occasionally bizarre”; and (3) sister’s allegations were undermined by a lack of corroborating physical evidence.

Contrary to father’s argument, a juvenile court may rely on hearsay statements from a minor who cannot distinguish between the truth and a lie to support its jurisdictional findings. In *In re Lucero L.* (2000) 22 Cal.4th 1227, 1247-1248, the court held that “the out-of-court statements of a child who is subject to a jurisdictional hearing and who is disqualified as a witness because of the lack of capacity to distinguish between truth and falsehood at the time of testifying may not be relied on exclusively unless the court finds that ‘the time, content and circumstances of the statement provide

sufficient indicia of reliability.’ ” In this case, the trial court did not make an express finding regarding sister’s ability to distinguish between a truth and a lie.<sup>2</sup> However, the court clearly and emphatically found that sister’s hearsay statements were supported by sufficient indicia of reliability. As noted above, the court found sister’s statements credible because they were repetitive, spontaneous and consistent; because she used language “that would be unusual for a child of this age and this exposure”; and because she lacked a motive to fabricate. The court added that the level of detail used to describe the abuse also established her credibility. The record amply supports the court’s credibility findings. Each of the witnesses related a similar story of abuse with remarkable details. In addition, the witnesses, who knew the sister well, found her story credible. The fact that the sister did not provide additional specific details regarding when exactly and how many times the alleged abuse occurred or that some of her statements may have been somewhat confusing, does not diminish the overall weight of the evidence. Considering the depth of detail regarding the acts and the consistent identity of perpetrator, the absence of specific days on which the abuse occurred or the number of times she was abused is immaterial. Due to sister’s developmental disability, some lack of specificity as to when and how often the abuse occurred is to be expected. Finally, corroborating physical evidence is not required and its absence is not sufficient to undermine the jurisdictional findings. (See *Id.* at p. 1249 [due process does not require corroboration of child’s hearsay statement by physical evidence]; see also *In re Cindy L.*, *supra*, 17 Cal.4th 15.)

**2. The trial court did not abuse its discretion in excluding evidence of allegations of sexual abuse made by the sister against individuals other than father.**

As set forth above, evidence was introduced that sister told the nurse practitioner at the rape treatment center that she was sexually assaulted by a classmate on the school

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<sup>2</sup> The court observed that Officer Terry appeared to have no training in asking questions to determine competency and the court “totally discounted” one of his questions because he failed to establish a necessary foundation. The court noted, however, that sister did tell the officer she knew lying was bad and she would be truthful.

bus. The trial court prevented father from asking other witnesses on cross-examination whether sister had made similar claims to them of abuse by her classmate. Father asserts that he was unfairly denied an opportunity to question the forensic interviewer about why she stopped the interview with sister when she brought up the incident with a classmate. Father contends that the exclusion of this evidence violated his right to due process and that the court abused its discretion in finding that these additional allegations of abuse were irrelevant.

“While a parent in a juvenile dependency proceeding has a due process right to a meaningful hearing with the opportunity to present evidence [citation], parents in dependency proceedings ‘are not entitled to full confrontation and cross-examination.’ [Citation.] Due process requires a balance. [Citation.] The state’s strong interest in prompt and efficient trials permits the nonarbitrary exclusion of evidence [citation], such as when the presentation of the evidence will ‘necessitate undue consumption of time.’ [Citation.] The due process right to present evidence is limited to relevant evidence of significant probative value to the issue before the court.” (*Maricela C. v. Superior Court* (1998) 66 Cal.App.4th 1138, 1146-1147.) “ ‘The standard of review where a parent is deprived of a due process right is whether the error was harmless beyond a reasonable doubt.’ ” (*M.T. v. Superior Court* (2009) 178 Cal.App.4th 1170, 1182.)

Father asserts that the excluded evidence was relevant because his “defense would have found significant support from evidence that [sister] was recounting abuse perpetrated by someone other than him.” While “ ‘[a] prior *false* accusation of sexual molestation is . . . relevant on the issue of the molest victim’s credibility’ ” (*People v. Tidwell* (2008) 163 Cal.App.4th 1447, 1457), there is absolutely no suggestion in the present case that sister’s accusations against anyone were false. The fact that sister may also have been sexually assaulted by others has little relevance to her allegations against her father.

In any event, its clear that the exclusion of this evidence was harmless beyond a reasonable doubt. The trial court found the evidence of sexual abuse overwhelming, noting that based on the evidence presented “[t]here’s nothing else the court could



conceivably do but to find the petition to be true.” The court considered the evidence that sister may have been molested by a classmate, but found it to be “an absolute red herring,” commenting, “I don’t know what happened with an 11-year-old boy on the bus, but he’s certainly not putting his penis in her vagina on the bus. He’s not taking her into a bathroom, and he’s not watching her naked in the shower. And he’s not doing the things in the full bus that this minor describes the stepfather doing.”<sup>3</sup> Accordingly, we will affirm the jurisdictional order.

### **3. Substantial evidence supports the dispositional order.**

Father argues that even assuming there is substantial evidence to support the jurisdictional findings under the applicable preponderance of the evidence standard, the same evidence does not rise to the level of clear and convincing necessary to support the dispositional order.

To remove a child from her parents’ custody, the juvenile court must find clear and convincing evidence that there is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the child if she were returned home, and there are no reasonable means by which the child’s physical health can be protected without removal. (§ 361, subd. (c)(1).) While the juvenile court must find clear and convincing evidence, we review the court’s ruling for sufficiency of the evidence to support its conclusion. (*Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 880–881.) Toward that end, “we draw all reasonable inferences from the evidence to support the findings and orders of the dependency court; we review the record in the light most favorable to the court’s determinations; and we note that issues of fact and credibility are the province of the trial court.” (*In re Heather A.* (1996) 52 Cal.App.4th 183, 193.)

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<sup>3</sup> During the jurisdictional hearing, the court also excluded testimony by sister’s former psychiatrist that sister claimed to have been sexually abused when she was nine years old and living in Mexico. The court found that any such communication with her psychiatrist was privileged and irrelevant. Although father references this evidentiary ruling in passing in his opening brief, he has not provided any argument specific to this ruling. Accordingly, any challenge to this ruling has been waived.

At the conclusion of the dispositional hearing, the juvenile court emphasized that she “found this case to be true by clear and convincing evidence. I found this case to be true beyond a reasonable doubt. [¶] I think it’s very important I believe [father] molested [sister]. I believe that beyond a reasonable doubt.” The court provided a second detailed analysis of the evidence presented at the jurisdictional hearing because she felt it was “so important for people to understand that this child is not making this up.” She then explained that she believed the father was “a manipulative, dangerous man” and detailed the evidence in support of that conclusion. She noted that she found his having his daughter “sitting on her lap and whispering to her, whispering to each other and stroking each other’s cheeks and gazing into each other’s eyes . . . frightening.” The record amply supports the juvenile court’s findings.<sup>4</sup> Accordingly, we affirm the dispositional order.

### **Disposition**

The jurisdictional and dispositional orders are affirmed.

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Pollak, J.

We concur:

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McGuinness, P. J.

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Siggins, J.

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<sup>4</sup> In his opening brief, father states that “after the jurisdictional hearing, the Department presented the court with a dispositional report indicating that [sister] had made several allegations of sexual abuse against individuals other than father in the past” and that “[d]uring the dispositional hearing, the court also learned that [sister] had made another allegation of sexual abuse against yet another relative.” Father’s request to question the social worker regarding the new allegations was again denied on the ground of relevance. Although father does not directly challenge this ruling on appeal, we note that for the reasons discussed above we find no error in the court’s ruling.